87-831

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CASEY E. ABEYTA
SPECIALIST FOUR, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the exclusion of results of an exculpatory polygraph examination, where petitioner did not testify in his own defense, violated petitioner's constitutional right to present a defense.

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CASEY E. ABEYTA
PRIVATE FIRST CLASS, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner CASEY E. ABEYTA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 25 M.J. 97 (C.M.A. 1987)(Appendix A). The opinion of the Army Court of Military Review is unreported, CM 448517 (A.C.M.R. 1986)(Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1987, affirming petitioner's conviction dated January 17, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be deprived of liberty or property, without due process of law."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Statement of the Case

Petitioner was charged with wrongfully distributing 9.27 grams of marijuana in the hashish form.[1] The offense was alleged to have occurred on or about January 31, 1985, at Ledward Barracks in Schweinfurt, Federal Republic of Germany.

Petitioner offered an alibi defense at trial, and adduced substantial evidence to support his contention that, at the time of the alleged offense, he was not in Schweinfurt, but rather in Frankfurt (R. 151-155, 178-181, 186-188, 198-200, 223-224). Further, petitioner demonstrated that he had been mistakenly identified as the perpetrator of the offense (R. 184, 208, 209), firmly established several factual discrepancies in the government's evidence (R. 32-34-38-183-193), and advanced logical explanations for the few apparent factual inconsistencies concerning his alibi (R. 148, 155, 172. 175.-177, 193, 200-201, 204-205, 223-224).

Petitioner also sought to admit the evidence, through expert testimony, of the exculpatory results of a polygraph examination (R. 70-146). Petitioner established, the government conceded, and the military judge recognized the proferred witness to be an expert in the science of polygraph (R. 79). However, the military judge ultimately refused to admit into evidence the expert's testimony regarding an exculpatory polygraph examination (R. 146-147).

The issue granted by the Court of military appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ADMIT INTO EVIDENCE THE EXCULPATORY RESULTS OF APPELLANT'S POLYGRAPH EXAMINATION.

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[1] Article 112a Uniform Code of Military Justice, 10 U.S.C. § 912a (Supp. II 1984).

The Court of Military Appeals found that polygrapher's testimony was not relevant without petitioner's consistent testimony. *United States v. Abeyta*, 25 M.J. 97, 98 (C.M.A. 1987).

REASONS FOR GRANTING WRIT

The exclusion of the polygraph examiner's testimony denied petitioner the fundamental right to compulsory process under the sixth amendment. Although this Court has had few opportunities to define the boundaries of the compulsory process clause, the Court has firmly established that criminal defendants have the right to have a jury consider evidence that might influence the determination of guilt.[2] *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1000 (1987). *See*, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). In *Washington v. Texas*, this Court stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19. The compulsory process clause may be violated when a criminal defendant is arbitrarily deprived of testimony that is relevant, material and favorable to his defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1981). *See*, e.g., *Washington v. Texas*, 388 U.S. at 19.

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[2] Congress has seen fit to extend the right of compulsory process to soldiers. *See* Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846 (1982).

When exculpatory defense evidence is excluded, the issue of a violation of due process is raised.[3] The court must then balance the defense's need for the evidence against legitimate government interest in excluding the evidence. In doing so, the court should consider the following factors: the probative value of the evidence on the central issue; its reliability; whether the evidence can be evaluated by the finder of fact; whether the evidence is cumulative; and whether it is vital to the defense. *Perry v. Rushen*, 713 F.2d 1447, 1452-53 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). On the other hand, the court should evaluate the purpose of its rule, its importance, how well the rule implements its purpose, and the relationship of the spirit of the rule to the case. The court must determine the government's interest in an orderly trial, judicial efficiency, and in preventing the admission of unreliable or prejudicial evidence. *Id.* In the case *sub judice*, the balance tips decidedly in petitioner's favor.

This Court has recently reaffirmed its holding in *Chambers* in stating that, "[W]hen a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but must meet the fundamental standards of due process." *Rock v. Arkansas*, 107 S.Ct. 2704, 2711 (1987). The Court of Military Appeals, in the present case, has mechanistically and arbitrarily applied the Military Rules of Evidence in establishing the requirement that an accused must testify before the results of an exculpatory polygraph would be relevant and admissible. This requirement is contrary to the interests of justice and the fundamental standards of due process.

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[3] The Due Process Clause is applicable to the military. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953), *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This requirement may be modified only when special military conditions justify a different rule than that applied under civilian law. *Kauffman v. Secretary of Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). The government has failed to justify the barring of the polygraph examiner's opinion testimony with current due process standards.

The United States Court of Military Appeals has opened the door for the admission of results of polygraph examinations by accused as evidence regarding the truthfulness of the declarant at the time of the polygraph examination. *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987). In *Gipson*, the court rejected the test for admissibility of scientific evidence established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as the "independent controlling standard of admissibility" of emerging scientific evidence. *Gipson*, 24 M.J. at 251. The standard which is now applied in military courts to determine the admissibility of scientific evidence is a three part test using the Military Rules of Evidence, *Manual for Courts-Martial, United States 1984*, Part IV (hereinafter cited as Mil. R. Evid.). First, the evidence must be relevant within the meaning of Mil. R. Evid. 401.[4] Second, it must aid the factfinder within the definition of Mil. R. Evid. 702.[5] Finally the probative value of the evidence must not be outweighed by extraneous factors within the meaning of Mil. R. Evid. 403.[6] *Id.* at 251-252.

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[4] Military Rule of Evidence 401, Relevant Evidence, states:

> "Relevant Evidence" means evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or iess probable than it would be without the evidence.

[5] Military Rule of Evidence 702, Testimony by Experts, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

This rule is identical to Federal Rule of Evidence 702, which was adopted from the common law rule. *See*, S. Saltzburg and K. Redden, Federal Rules of Evidence Manual, 631 (4th ed. 1986).

[6] Military Rule of Evidence 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, states:

> Although relevant, evidence may be excluded it its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In petitioner's case, the military judge did not allow the admission of the polygraph examiner's testimony, relying on the *Frye* test which required that the evidence be "of a type generally accepted in the scientific community." The Court of Military Appeals applied the *Gipson* standard but found that petitioner was not prejudiced by the exclusion of the polygraph examiner's testimony. *United States v. Abeyta*, 25 M.J. 97, 98 (C.M.A. 1987). In *Gipson*, the Court stated that the expert can only testify about whether or not the results of the polygraph examination show that the examinee was being truthful at the time of the examination. The factfinder must draw an inference determining the truthfulness of the examinee's trial testimony. *Gipson*, 24 M.J. at 252-253. In the present case, the court held that this inference could not be drawn because petitioner did not testify at trial and, therefore, because his credibility was not in issue the expert's testimony was not relevant. *Abeyta*, 25 M.J. at 98. This holding erroneously denied petitioner his right to present a defense.

The polgraph examiner's opinion testimony was relevant and crucial to petitioner's case, especially in light of petitioner's pre-trial statement in which he admitted selling hashish "sometime during the end of January." Petitioner contended that his confession did not relate to the offense charged by the government. Petitioner's theory of the case was that the individual to whom be admitted selling hashish was not the government agent who testified at the court-martial that he bought drugs from petitioner on January 31, 1985. The sole issue at stake in petitioner's trial was identity. Although petitioner's "personal" credibility was not in issue because he did not testify, the credibility of his alibi defense was essential to establishing his innocence. The exculpatory polygraph evidence, therefore, was vital to proving a credible alibi defense because it related directly to the believability of that defense.

The Court of Military Appeals is rightfully concerned with allowing the admission of exculpatory evidence which is relevant and helpful, and where the probative value is not out-

weighed by extraneous factors. In *Gipson*, the Court stated that it would not condone the admission of the expert's opinion absent the examinee's consistent testimony, because otherwise the opinion testimony about the credibility of the accused would be the only evidence presented to the factfinder. *Gipson*, 24 M.J. at 253.[7] However, the present case is not one where the expert's opinion would be the only evidence presented to the factfinder supporting petitioner's assertion of innocence. Petitioner presented alibi witnesses which corroborate the polygraph examiner's opinion that petitioner was being truthful at the time of the examination. This evidence provides the essential requirement of trustworthiness and could properly allow the factfinder to draw an inference that petitioner was not guilty or reject the evidence and convict. The government would, of course, be free to cross-examine the polygraph expert and completely and fairly question his opinion, the scientific data and all other factors affecting the reliability of his testimony.

Conclusion

The right to compulsory process is essential to a fair trial. Petitioner was denied a fair trial guaranteed by traditional and fundamental standards of due process. His defense was far less persuasive than it might have been had he been given the opportunity to introduce the exculpatory polygraph evidence. The issue presented by petitioner is fact specific and it would not require this Court to rule that all exculpatory polygraph evidence is admissible. Petitioner, however, seeks a proper balancing between the right of an accused to have his fact finder hear all relevant and material evidence and the government's legitimate interest in excluding unreliable evidence and assuring an orderly trial. The polygraph evi-

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[7] The Court of Military Appeals, however, is not concerned that factfinders will place too much weight on polygraph testimony. *Id.* The Court cited studies which concluded that the juries can objectively evaluate polygraph evidence and not be unduly influenced by it. *See*, Imwinkelried, The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology, 100 Mil.L.Rev. 99, 114-15 (1983).

dence, in this case, is highly relevant and necessary to petitioner's defense. For these reasons, this petition for certiorari should be granted.

Respectively submitted,

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Appendices

UNITED STATES COURT OF MILITARY APPEALS

No. 55,592.
SPCM 21773.

UNITED STATES, APPELLEE.

v.

CASEY E. ABEYTA
SPECIALIST FOUR, UNITED STATES ARMY,
APPELLANT.

Sept. 25, 1987.

For Appellant: *Colonel Brooks B. La Grua, Major Joel D. Miller, Captain Stewart C. Hudson, Captain David L. Carrier* (on petition).

For Appellee: *Colonel Norman G. Cooper, Lieutenant Colonel Gary F. Roberson, Major Byron J. Braun, Major Thomas E. Booth (USAR)*(on petition).

Opinion of the Court

COX, Judge:

The issue in this case is whether the military judge erred in refusing to admit in evidence the results of an "exculpatory" defense polygraph examination. 24 M.J. 58. The trial, a special court-martial convened at Schweinfurt, Federal Republic of Germany, was by military judge alone. The single specification alleged wrongful distribution of hashish on or about January 31, 1985, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a.*

The Government presented evidence that, after knowingly and intelligently waiving his rights to counsel and to remain silent, appellant executed a written confession to the effect

* Appellant's sentence to a bad-conduct discharge, confinement for 4 months, partial forfeitures, and reduction to E-1 was approved by the convening authority and affirmed by the Court of Military Review in a short-form opinion.

that, "sometime during the end of Jan 85," he sold "some hash" for $150 to an individual known as "T." A military policeman, who's first name begins with "T," further testified that be bought hashish from appellant for $150 (three $50 bills) on January 31, 1985. The Government also introduced in evidence chain-of-custody documents, a lab report, and the purchased hashish that was not consumed in testing.

Appellant did not testify in his own defense. He attempted to present an alibi defense through other witnesses and to show that "T" may have referred to an individual named Tanner (who had been "chaptered out" of the service, allegedly for failing a urinalysis test). Appellant also sought to introduce the conclusions of the polygrapher that he was truthful in denying that, "on the 31st of January 1985," he possessed or sold hashish, or that he "receive[d] three 50 dollar bills from someone."

The military judge refused to receive the polygrapher's testimony, applying the standard for admissibility first announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923)(proponent must establish that evidence is "of a type generally accepted in the scientific community"). In *United States v. Gipson*, 24 M.J. 246 (C.M.A.1987), a decision handed down long after this military judge made his ruling below, we rejected the *Frye* test as the "independent controlling standard of admissibility" of emerging scientific evidence. *Id.* at 251, *quoting United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir.1985). Instead, the judge must determine if the evidence is relevant within the meaning of Mil.R.Evid. 401, Manual for Courts-Martial, United States, 1984; if it is helpful to the factfinder within the meaning of Mil.R.Evid. 702; and if its probative value is outweighed by collateral dangers, as outlined in Mil.R.Evid. 403. 24 M.J. at 251-52. Unlike *Gipson*, the judge here permitted the defense to call its expert as a witness in its attempt to lay a foundation for admissibility of the polygraph evidence.

Despite the different standard of admissibility, appellant suffered no prejudice, Art. 59(a), UCMJ, 10 U.S.C. § 859(a), because we also discussed in *Gipson* the permissible use for polygraph evidence. We concluded that

> [a]t best, the expert can opine whether the examinee was being truthful or deceptive in making a particular

> assertion *at the time of the polygraph exam.* It is then for the factfinder to decide whether to draw an inference regarding the truthfulness of the examinee's *trial* testimony.

24 M.J. at 252-53 (footnote and citation omitted). Without appellant's consistent testimony, the inference could not be drawn; thus, this polygrapher's testimony was not relevant.

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

SULLIVAN, Judge (concurring in the result):

I concur in the result for the reasons stated in my dissent in *United States v. Gipson*, 24 M.J. 246, 255-56 (C.M.A.1987).

UNITED STATES ARMY COURT OF
MILITARY REVIEW

Before
MARDEN, PAULEY, and De GIULIO
Appellate Military Judges

SPCM 21773

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR
CASEY E. ABEYTA,
509-64-1102,
UNITED STATES ARMY, APPELLANT

3d Infantry Division

C. R. Pardue,
Military Judge

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Major Stephen R. Dooley, JAGC, Captain David L. Carrier, JAGC, Major D. David Hostler, JAGC, USAR (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Major Byron J. Braun, JAGC, Captain John F. Burnette, JAGC (on brief).

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22 April 1986

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

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